IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 05-CV-00329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION TO COMPEL TYSON FOODS, INC. TO RESPOND TO ITS MAY 30, 2006 SET OF REQUESTS FOR PRODUCTION AND BRIEF IN SUPPORT

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and for its Motion to Compel Tyson Foods, Inc. to Respond to its May 30, 2006 Set of Requests for Production states as follows:[1]

I. INTRODUCTION

On May 30, 2006 the State propounded to Defendant Tyson Foods, Inc. ("Tyson") a set of requests for production centering on documents and materials produced to plaintiffs in a similar poultry waste pollution lawsuit previously brought in this Court, *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900. The requested documents and materials concerned documents and materials made available for inspection and copying by Tyson to plaintiffs in the *City of Tulsa* lawsuit (Request for Production No. 1); privilege logs produced by Tyson to plaintiffs in the *City*

[1] The parties conferred in good faith on July 31, 2006, and have been unable to reach an accord on the matters that are the subject of this motion.

of Tulsa lawsuit (Request for Production No. 2); written discovery responses made by Tyson to plaintiffs in the *City of Tulsa* lawsuit (Request for Production No. 3); transcripts of persons in Tyson's employ and / or under contract with Tyson who were deposed in the *City of Tulsa* lawsuit, including all exhibits referenced in the deposition (Request for Production No. 4); transcripts of depositions of persons retained by Tyson as expert witnesses who were deposed in the *City of Tulsa* lawsuit (Request for Production No. 5); documents and materials referring, relating or pertaining to the implementation of and compliance with the terms of the consent order entered in the *City of Tulsa* lawsuit (Request for Production No. 6); and joint defense agreements to which Tyson is a party that pertain to, in whole or in part, the current lawsuit, *State of Oklahoma v. Tyson Foods, Inc.* (Request for Production No. 7). (Objections and Responses of Tyson Foods, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production [Ex. A].) The State's requests for production, given the similarities between its case and the *City of Tulsa* lawsuit, *see infra*, were simply an effort to save all the parties involved time and money. *See* Fed. R. Civ. P. 1.

In response to Requests for Production Nos. 1-6, however, Tyson objected that the requests sought the production of documents and materials "which are irrelevant and not likely to lead to the discovery of admissible evidence." (Objections and Responses of Tyson Foods, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production [Ex. A].). In response to Requests for Production Nos. 1 and 4-6, Tyson also objected that the requests were "overly broad [and] unduly burdensome." (Objections and Responses of Tyson Foods, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production [Ex. A].). In response to Request for

Production No. 6, Tyson also objected that it was "vague and ambiguous."[2] And finally, in response to the State's request for copies of any joint defense agreements, Tyson objected with privilege and protection claims. (Objections and Responses of Tyson Foods, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production [Ex. A].). In sum, Tyson's overarching position appears to be that documents and materials involved in a similar prior case in which it was involved have absolutely no bearing on matters in this case. This claim is untenable.

The similarities between this lawsuit and the *City of Tulsa* case are numerous, particularly as pertains to the Poultry Integrator Defendants' conduct and the theories of Poultry Integrator Defendants' legal liability. For instance:

- Both cases involve government entities suing poultry integrators for pollution to Oklahoma waters. (*Compare* Oklahoma Compl. ¶ 5 with Tulsa Compl. ¶ 3.)

- The Oklahoma suit names six of the seven defendants named in the *City of Tulsa* suit (Tyson Foods, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., Cargill, Inc., and George's, Inc.), and those six defendants are poultry integrators. (*Compare* Oklahoma Compl. ¶¶ 6-21 with Tulsa Compl. ¶¶ 4-9.)

- Both cases allege impairment of the beneficial and public use and enjoyment of Oklahoma waters. (*Compare* Oklahoma Compl. ¶¶ 25-27 with Tulsa Compl. ¶¶ 2, 29.)

- Both cases allege pollution of water bodies that are sources of drinking water. (*Compare* Oklahoma Compl. ¶ 28 with Tulsa Compl. ¶¶ 11-14.)

- Both cases are actions for pollution by poultry integrators of a watershed area. (*Compare* Oklahoma Compl. ¶¶ 22-23 with Tulsa Compl. ¶¶ 14-16.)

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[2] This objection is summarily disposed of inasmuch as it appears that other Poultry Integrator Defendants served with the identical discovery requests apparently had no difficulty discerning the documents the State was seeking. *See, e.g.,* Objections and Responses of Peterson Farms, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production [Ex. B] (no vague and ambiguous objection interposed); Objections and Responses of George's, Inc., and George's Farms, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production [Ex. C] (no vague and ambiguous objection interposed); Objections and Responses of Simmons Foods, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production [Ex. D] (no vague and ambiguous objection interposed).

- Each case has as its gravamen the pollution activities by the poultry integrators in a watershed area. (*Compare* Oklahoma Compl. ¶¶ 51-55 with Tulsa Compl. ¶ 16.)

- Both cases allege that the same type of activities by the poultry integrators are the cause of the pollution of the waters. (*Compare* Oklahoma Compl. ¶¶ 32-42 with Tulsa Compl. ¶ 18.)

- Both cases allege that the relationship between the poultry integrators and their growers is a relationship of employer / employee or principal / agent, and that the relationship of the growers to the poultry integrators is not that of an independent contractor. (*Compare* Oklahoma Compl. ¶ 43 with Tulsa Compl. ¶ 18.)

- Both cases focus on the specific manner in which the poultry integrators and their growers dispose of poultry waste on land as the underlying cause of the pollution and damages complained of. (*Compare* Oklahoma Compl. ¶¶ 48-57 with Tulsa Compl. ¶ 19.)

- Both cases allege that overload levels of phosphorus and nitrogen from the poultry waste create part of the pollution and damages complained of. (*Compare* Oklahoma Compl. ¶¶ 58-61 with Tulsa Compl. ¶ 20.)

- Both cases assert a CERCLA cause of action. (*Compare* Oklahoma Compl. ¶¶ 70-77 with Tulsa Compl. ¶¶ 33-41.)

- Both cases assert a state law nuisance claim. (*Compare* Oklahoma Compl. ¶¶ 90-100 with Tulsa Compl. ¶¶ 47-52.)

- Both cases assert a state law claim for trespass. (*Compare* Oklahoma Compl. ¶¶ 111-119 with Tulsa Compl. ¶¶ 53-56.)

- Both cases assert a state law claim for unjust enrichment. (*Compare* Oklahoma Compl. ¶¶ 132-139 with Tulsa Compl. ¶¶ 68-71.)

It is clear that this case and the *City of Tulsa* case involve many similar questions of facts, many similar questions of law, and a substantial identity of the defendant parties.[3] Thus, Tyson's boilerplate objection that the State's Requests for Production seek "the production of documents and materials which are irrelevant and not likely to lead to the discovery of admissible evidence"

[3] Admittedly, the instant case and the *City of Tulsa* case are not completely identical. For example, the instant case involves broader injury and damages claims than those alleged in the *City of Tulsa* case. But that in no way diminishes the relevancy of the State's discovery requests.

has no merit, especially given the fact that Tyson's Objections and Responses give no rational basis for this position.[4]

II. ARGUMENT

A. The State's Requests for Production Ask for Relevant, Discoverable Documents and Materials from Related Prior Litigation

As described above, the State is requesting documents and materials from prior litigation that involved many similar issues. Such requests are relevant to the instant lawsuit, and are discoverable.

A Kansas District Court dealt with this issue in *Snowden v. Connaught Labs., Inc.*, 137 F.R.D. 325 (D. Kan. 1991). The *Snowden* plaintiffs brought a products liability action over the DPT vaccine and requested the production of "documents, records and pleadings growing out of prior litigation." *Snowden*, 137 F.R.D. at 327. The requests for production were virtually identical in nature to what the State has asked for here, and included the following sorts of requests for documents and materials from the prior litigation:

- Copies of interrogatories directed to defendants and their responses;
- Copies of requests for production of documents and their responses;
- Copies of requests for admissions and their responses;
- Copies of depositions taken of defendants' employees and former employees; and
- Copies of transcripts of court testimony.

[4] Tyson cannot credibly assert that its poultry waste handling practices (or the adverse environmental impact of those practices) in the Eucha-Spavinaw Watershed are *sui generis*.

Snowden, 137 F.R.D. at 328. The *Snowden* plaintiffs argued that the documents were relevant and material because "the other lawsuits are identical in nature" and production "would serve to limit the breadth and scope of discovery." *Snowden*, 137 F.R.D. at 328.

Defendants in *Snowden* – just like Tyson here – argued that the materials did not have to be produced because the request was "unduly burdensome and excessive due to the scope" and "not reasonably calculated to lead to admissible evidence." *Snowden*, 137 F.R.D. at 328. Defendants in *Snowden* also argued that there was no central repository for the documents and that they were "in the possession of various lawyers who are no longer employed" by defendants. *Snowden*, 137 F.R.D. at 328.[5]

In rejecting defendants' arguments and granting plaintiffs' motion to compel, the *Snowden* court observed that "'[i]t is plain that the scope of discovery through interrogatories and requests for production of documents is limited only by relevance and burdensomeness.'" *Snowden*, 137 F.R.D. at 329 (quoting *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 343 (10th Cir. 1975)). The test for relevancy is a liberal one: "a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the actions." *Snowden*, 137 F.R.D. at 329. Put another way, discovery should be allowed unless it is clear that the information cannot have any possible bearing on the subject matter of the action.

The *Snowden* court determined that the claims asserted "would presumably be the same types of claims" asserted in the prior cases and that the subject matter would be the same. *Snowden*, 137 F.R.D. at 330. Such is the case here. The *Snowden* court also recognized that the information sought from the prior litigation "could save the time and expense of duplicating

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[5] Tyson's counsel here represented Tyson in the *City of Tulsa* case. *See City of Tulsa*, 258 F. Supp. 2d 1263, 1269 (N.D. Okla. 2003), *vacated in connection with settlement*.

discovery aimed at the same issues and materials already produced in prior litigation." *Snowden*, 137 F.R.D. at 330. The similarity of the cases lead the court to conclude that "it is not unlikely that discovery of this nature will lead to admissible evidence," "plaintiffs' claim of relevance has merit," and "the documents, pleadings and records plaintiffs seek meet the broad test of relevancy under Rule 26 and the case law construing that rule." *Snowden*, 137 F.R.D. at 330.

A Maryland District Court reached the same conclusion when addressing plaintiffs' motion to compel documents related to two lawsuits brought against the defendant in other jurisdictions. *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495 (D. Md. 2000). There, defendant objected to production of the documents on grounds of relevance and burdensomeness, among other grounds. *Tucker*, 191 F.R.D. at 497. The *Tucker* court rejected defendant's relevance and burdensomeness arguments.

First, the *Tucker* court ruled that plaintiffs had established threshold relevance under Fed. R. Civ. P. 26(b)(1) and Fed. R. Evid. 401 because plaintiffs in the prior case alleged the same causes of action as were alleged in the case before the court. *Tucker*, 191 F.R.D. at 497-98. Second, the court characterized the *Tucker* defendant's assertions of burdensomeness as "non-specific objections, which are insufficient to prevent the requested discovery." *Tucker*, 191 F.R.D. at 498. As the *Tucker* court noted, "[t]he party claiming that a discovery request is unduly burdensome must allege specific facts that indicate the nature and extent of the burden, usually by affidavits or other reliable evidence. A conclusory assertion of burden and expense is not enough." *Tucker*, 191 F.R.D. at 498 (citations omitted).

The *Snowden* and *Tucker* courts' reasoning is directly applicable to the issue before this Court, and supports a grant of the State's Motion to Compel.

B. Tyson's Formulaic, Boilerplate Objections Are Inadequate

Tyson's standard, boilerplate objection to the State's Requests for Production indicates the lack of seriousness that attends Tyson's consideration of the Requests. A party resisting production has the burden of establishing lack of relevancy or undue burden. *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D. Kan. 1997) (*citing Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540 (10th Cir. 1984)). The party resisting discovery must show the court "that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Burke v. New York City Police Department*, 115 F.R.D. 220, 224 (S.D.N.Y. 1987).

"The litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request." *Oleson*, 175 F.R.D. at 565; *see also Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3rd Cir. 1982) (the "mere statement by a party that the [discovery request] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection") (quoting *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980)); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986) (holding objecting party must demonstrate that a particularized harm is likely to occur if the discovery be had by the party seeking it). Boilerplate burdensomeness and relevancy objections that do not set out any explanation or argument for burdensomeness or irrelevancy are improper. *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006).

As one court noted, in language directly applicable here, "each objection asserted by the [resisting party] is boilerplate, obstructionist, frivolous, overbroad, and, significantly, contrary to well-established and long standing federal law." *St. Paul Reinsurance Co. v. Commercial Fin.*

Corp., 198 F.R.D. 508, 511 (N.D. Iowa 2000). The Court should reject Tyson's one-sentence boilerplate objections and compel it to produce the documents requested.

C. Tyson's Claim That Joint Defense Agreements Are Privileged or Protected is Unavailing

The State's Request for Production No. 7 requests "copies of all joint defense agreements to which you are a party that pertain to, in whole or in part, the *State of Oklahoma v. Tyson Foods, Inc.*, 05-CV-329, lawsuit." Tyson's complete objection and response is a one-line statement: "Tyson Foods, Inc. objects to Request for Production No. 7 because it seeks the production of documents that have been prepared in anticipation of litigation and are covered by the attorney-client privilege and/or the joint defense privilege, the attorney work-product doctrine, and the common interest privilege." (Objections and Responses of Tyson Foods, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production [Ex. A].). This objection is unfounded.[6]

The State is requesting copies of any joint defense agreements themselves. Such agreements, to the extent there are any, are necessary for the State to evaluate Tyson's privilege claims in this litigation. Tyson has done nothing to even indicate why any privilege or protection applies to any such agreements. One court, after viewing *in camera* a joint defense agreement, stated that "[t]he claim that the [joint defense] agreement itself is work product is without merit. The agreement does nothing to reveal counsel's mental impressions or thought processes, and the substantial need is fulfilled by the requirement of proving the privilege." *Power Mosfet Techs. v. Siemens AG*, 206 F.R.D. 422, 426 n. 12 (E.D. Tex. 2000). The court held that "[w]hen the

[6] To the extent any such agreements were entered into prior to the filing of the State's lawsuit, Tyson is required to provide a privilege log setting forth the documents being withheld from production. *See* LCvR26.4.

propriety of the privilege is disputed, then courts must resort to *in camera* inspection to determine what documents if any are protected." *Power Mosfet*, 206 F.R.D. at 426 n. 12. In the case before it, the *Power Mosfet* court determined that judicial economy was best served by producing the document. *Power Mosfet*, 206 F.R.D. at 426 n. 12; *see also United States v. Hsia*, 81 F. Supp. 2d 7, 11 n. 3 (D.D.C. 2000) (stating court was unconvinced "that either the existence or the terms of a JDA [joint defense agreement] are privileged").

Here, Tyson has provided absolutely no indication, evidence, or argument that any joint defense agreement to which it is a party in this case is deserving of any privilege or protection. Therefore, the Court should order Tyson to produce copies of any such agreements.

III. CONCLUSION

For all of the above reasons, the State of Oklahoma respectfully requests the Court to compel Defendant Tyson Foods, Inc. to respond to the State's May 30, 2006 set of requests for production and produce the requested documents forthwith.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
Attorney General
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Robert D. Singletary OBA #19220
Assistant Attorneys General
State of Oklahoma
2300 North Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105
(405) 521-3921

C. Miles Tolbert OBA #14822
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, Ok 73118
(405) 530-8800

/s/ M. David Riggs
M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

James Randall Miller, OBA #6214
David P. Page, OBA #6852
Louis Werner Bullock, OBA #1305
Miller Keffer & Bullock
222 S. Kenosha
Tulsa, Ok 74120-2421
(918) 743-4460

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Motley Rice, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of August, 2006, I electronically transmitted the attached document to the following:

Jo Nan Allen jonanallen@yahoo.com, bacaviola@yahoo.com
Robert Earl Applegate hm@holdenokla.com rapplegate@holdenokla.com
Tim Keith Baker tbakerlaw@sbcglobal.net
Sherry Bartley sbartley@mwsgw.com
Douglas L. Boyd dboyd31244@aol.com
Vicki Bronson vbronson@cwlaw.com, lphillips@cwlaw.com
Paula M Buchwald pbuchwald@ryanwhaley.com, loelke@ryanwhaley.com
Michael Lee Carr hm@holdenokla.com mcarr@holdenokla.com
Bobby Jay Coffman bcoffman@loganlowry.com
Lloyd E. Cole, Jr colelaw@alltel.net, gloriaeubanks@alltel.net; amy_colelaw@alltel.net
Angela Diane Cotner AngelaCotnerEsq@yahoo.com
Reuben Davis; rdavis@boonesmith.com
John Brian DesBarres mrjbdb@msn.com, JohnD@wcalaw.com
Delmar R Ehrich dehrich@faegre.com, kcarney@faegre.com; qsperrazza@faegre.com
John R Elrod jelrod@cwlaw.com, vmorgan@cwlaw.com
William Bernard Federman wfederman@aol.com; law@federmanlaw.com, ngb@federmanlaw.com
Bruce Wayne Freeman bfreeman@cwlaw.com, lcla@cwlaw.com
Ronnie Jack Freeman jfreeman@grahamfreeman.com
Robert W George robert.george@kutakrock.com, donna.sinclair@kutakrock.com
Tony Michael Graham tgraham@grahamfreeman.com, <B! R
James Martin Graves jgraves@bassettlawfirm.com
Michael D Graves mgraves@hallestill.com, jspring@hallestill.com; smurphy@hallestill.com
Thomas James Grever tgrever@lathropgage.com
Jennifer Stockton Griffin jgriffin@lathropgage.com
Carrie Griffith griffithlawoffice@yahoo.com
Michael Todd Hembree hembreelaw1@aol.com, traesmom_mdl@yahoo.com
Theresa Noble Hill thillcourts@rhodesokla.com, mnave@rhodesokla.com
Philip D Hixon Phixon@jpm-law.com,
Mark D Hopson mhopson@sidley.com, dwetmore@sidley.com; joraker@sidley! .com
Thomas Janer SCMJ@sbcglobal.net; tjaner@cableone.net; lanaphillips@sbcglobal.net
Stephen L Jantzen sjantzen@ryanwhaley.com, mantene@ryanwhaley.com; loelke@ryanwhaley.com
Mackenzie Lea Hamilton Jessie maci.tbakerlaw@sbcglobal.net, tbakerlaw@sbcglobal.net; macijessie@aol.com
Bruce Jones bjones@faegre.com, jintermill@faegre.com; bnallick@faegre.com
Jay Thomas Jorgensen jjorgensen@sidley.com, noman@sidley.com
Raymond Thomas Lay rtl@kiralaw.com, dianna@kiralaw.com; niccilay@cox.net
Krisann Kleibacker Lee kklee@faegre.com, mlokken@faegre.com

Nicole Marie Longwell Nlongwell@jpm-law.com, ahubler@jpm-law.com
Dara D. Mann dmann@faegre.com, kolmscheid@faegre.com
Teresa Brown Marks teresa.marks@arkansasag.gov, dennis.hansen@arkansasag.com
Linda C Martin lmartin@dsda.com, mschooling@dsda.com
Archer Scott McDaniel, Smcdanie l@jpm-law.com, jwaller@jpm-law.com
Robert Park Medearis , Jr medearislawfirm@sbcglobal.net
Charles Livingston Moulton charles.moulton@arkansasag.gov, Kendra.jones@arkansasag.gov
John Stephen Neas, steve_neas@yahoo.com
George W Owens gwo@owenslawfirmpc.com, ka@owenslawfirmpc.com
Chris A. Paul cpaul@jpm-law.com
Michael Andrew Pollard mpollard@boonesmith.com, kmiller@boonesmith.com
Marcus N Ratcliff mratcliff@lswsl.com, sshanks@lswsl.com
Robert Paul Redemann@rredemann@pmrlaw.net, scouch@pmrlaw.net
Randall Eugene Rose rer@owenslawfirmpc.com, ka@owenslawfirmpc.com
Patrick Michael Ryan pryan@ryanwhaley.com, jmickle@ryanwhaley.com;
kshocks@ryanwhaley.com
Laura E. Samuelson lsamuelson@lswsl.com; lsamuelson@gmail.com
Robert E Sanders rsanders@youngwilliams.com,
David Charles Senger dsenger@pmrlaw.net, scouch@pmrlaw.net
Jennifer Faith Sherrill jfs@federmanlaw.com, law@federmanlaw.com; ngb@federmanlaw.com
Michelle B. Skeens hm@holdenokla.com mskeens@holdenokla.com
William Francis Smith bsmith@grahamfreeman.com
Monte W Strout strout@xtremeinet.net
Colin Hampton Tucker chtucker@rhodesokla.com, scottom@rhodesokla.com
John H Tucker jtuckercourts@rhodesokla.com
R Pope Van Cleef ! , Jr popevan@robertsonwilliams.com, kirby@robertsonwilliams.com;
kmo@robertsonwilliams.com
Kenneth Edward Wagner kwagner@lswsl.com, sshanks@lswsl.com
David Alden Walls wallsd@wwhwlaw.com, lloyda@wwhwlaw.com
Timothy K Webster twebster@sidley.com, jwedeking@sidley.com; ahorner@sidley.com
Terry Wayen West terry@thewestlawfirm.com,
Dale Kenyon Williams, Jr. kwilliams@hallestill.com, jspring@hallestill.com;
smurphy@hallestill.com
Edwin Stephen Williams steve.williams@youngwilliams.com
J Ron Wright ron@wsfw-ok.com, susan@wsfw-ok.com
Lawrence W Zeringue lzeringue@pmrlaw.net, scouch@pmrlaw.net
N. Lance Bryan; lbryan@dsda.com
Gary V. Weeks, gweeks@bassettlawfirm.com
Thomas C. Green; tcgreen@sidley.com

I hereby certify that on this 24 day of August, 2006, I served the foregoing document by U.S. Postal Service on the following:

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Gordon W. Clinton
Susann Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

Eugene Dill
P O BOX 46
COOKSON, OK 74424

Marjorie Garman
5116 Highway 10
Tahlequah, OK 74464

James C. Geiger
Address unknown

G. Craig Heffington
20144 W SIXSHOOTER RD
COOKSON, OK 74427

Cherrie House
William House
P O BOX 1097
STILWELL, OK 74960

James Lamb, Dorothy Gene Lamb &
James R. & Doroth Jean Lamb dba
Strayhorn Landing Marina
Route 1, Box 253
Gore, OK 74435

Jerry Maddux
Selby Connor Maddux Janer
P.O. Box Z
Bartlesville, OK 74005-5025

Doris Mares
P O BOX 46
COOKSON, OK 74424

Donna S Parker
Richard E. Parker
34996 S 502 RD
PARK HILL, OK 74451

Kenneth Spencer
Jane T. Spencer
Rt. 1, Box 222
Kansas, OK 74347

David R. Wofford
Robin L. Wofford
Rt 2, Box 370
Watts, OK 74964

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

John E. and Virginia W. Adair
Family Trust
Rt. 2, Box 1160
Stillwell, OK 74960

/s/ M. David Riggs
M. David Riggs